APPELLEES' PETITION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
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WM. B. LUCK, CLERK

No. 21639 ✓

JEAN J. WINTHORNE and MELANIE WINTHORNE,
husband and wife,

Appellants and Cross-Appellees,

vs.

THE SEEBURG CORPORATION, a corporation;
SEEBURG DISTRIBUTING COMPANY, a
corporation,

Appellees and Cross-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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STATEMENT

Minthorne and Seeburg made a general agreement settling many financial relationships, all as is suggested in the opinion of the Court. In the course of the readjustment of relationships, Minthorne was left to lease or operate a route of equipment in Arizona, on which he was responsible for a series of payments, and for which he had never paid anything.

Nothing having been paid, the property was repossessed by Seeburg, the original owner, and sold for $40,000 less than what was owed to Seeburg.

This repossession was taken, in Seeburg's view of the matter, in accordance with an elaborate contractural provision in the basic contract, known as Exhibit D, which governed repossession rights. Exhibit D included, among other arrangements, a provision that Seeburg should give Minthorne the opportunity to take over the equipment and operate it. Seeburg contended that such an opportunity had been given to Minthorne, but the jury found to the contrary.

The issue then became, what consequence does this failure have? There were two possible losses to be distributed:

(a) Seeburg's loss on the property; and

(b) Minthorne's loss for what was allegedly a wrongful repossession.

The District Court held that the provision in question was "a condition precedent, not a covenant or a promise," and that therefore Seeburg could not affirmatively recover the amount of the deficiency from Minthorne. On the other hand, it held that Minthorne was not entitled to damages for loss of the opportunity to take over and operate the equipment, because the clause in question was a condition upon the right to repossess rather than a promise of an opportunity to take over.

This Court has now reversed, suggesting (perhaps but not certainly; we shall discuss this) that the language in question was both a condition and a covenant, a condition on Seeburg's right to repossess and a covenant to give Minthorne

the right to take over and operate; the matter has been remanded for consideration of damages. We respectfully submit that this is error and ask for reconsideration.

ARGUMENT

1. The condition as a precedent and also as a covenant is used in commercial situations where a party has agreed to make a purchase; if he does not get delivery of the requisite quality, Wheeling Stamping Co. v. Birdsboro Steel Foundry & Machine Co., 245 F.2d 752 (3d Cir. 1959) Restatement, Contracts § 257, illustration 2 (1932); or delivery on time, General Electric Co. v. Chattanooga Coal & Iron Corp., 241 F. 38 (6th Cir. 1917), Koolvent Alum. Awning Co. v. Sperling, 16 N.J. Super. 444, 84 A.2d 762 (1951); or notice, Internatio-Rotterdam, Inc. v. River Brand Rice Mills, Inc., 259 F.2d 137 (2d Cir. 1958), cert. denied, 358 U.S. 946, 79 S. Ct. 352, 3 L. Ed. 2d 352 (1959), Rice Growers Ass'n v. F. Carrera & Hno, Inc., 234 F.2d 843 (1st Cir. 1956), he need not pay, because the condition has not been met; and he can recover on the covenant to deliver for his loss of profit or similar damage, Bartlett & Co. Grain v. Merchants Co., 323 F.2d 501 (5th Cir. 1963) (damages for poor quality), Time Finance Co. v. Beckman, 295 S.W.2d 346 (Ky. 1956) (damages for late delivery). In this sense the same agreement may contain both a condition and a covenant. The

passage in Witkin, California Law, § 233, p. 262, is of this type.*

But in other situations, the concepts are considered as disjunctive. E.g., Southern Sur. Co. v. MacMillan Co., 58 F.2d 541 (10th Cir. 1932), cert denied, 287 U.S. 617, 53 S. Ct. 17, 77 L. Ed. 536 (1932) (clause requiring obligees to give surety notice of any default by principal held to be covenant). Baker Aircraft Sales, Inc. v. Cassel, 200 Cal. App. 2d 563, 19 Cal. Rptr. 581 (1962) (clause requiring repossessed property to be sold in accordance with California pledge laws held to be covenant). Larson v. Thoreson, 116 Cal. App. 2d 790, 254 P.2d 656 (1953) (obligation to match appellant's monetary contribution to joint venture held to be a covenant). The primary goal of interpretation in this area is to avoid forfeitures; that is why the interpretation of covenant is frequently favored. Charles Ilfeld Co. v. Taylor, 156 Colo. 204, 397 P.2d 748 (1964). See also 5 Williston, Contracts § 665 (3d ed. 1961), Green County v. Quinlan, 211 U.S. 582, 29 S. Ct. 162, 53 L. Ed. 335 (1909). To find that the clause is both a covenant and a condition precedent may risk a forfeiture of Seeburg's deficiency rights and make them liable for damages as well.

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*The three Witkin citations are first, the Restatement, cited above; and second, two cases which illustrate other points in the long paragraph to which it is appended but do not relate to this matter. See also § 261 of the same Restatement, referring to the fact that the same words may sometimes mean that one party promised performance and that the other party's promise is conditional on that performance.

2. We are then brought back to the basic purpose of the entire contract, and Exhibit D, and this clause. The purpose of the contract was to reorder the commercial relations of the parties. By virtue of the contract, Seeburg took over about $800,000 of Minthorne's liabilities, and left him primarily liable on $569,000. If he or his operators did not keep up the payments, Seeburg could repossess; after 90 days of non-payment, this was an absolute right. Within 90 days, if Seeburg did not give Minthorne an opportunity to take over the route and operate it, the most that can be said is that Seeburg forfeited the right to collect its $40,000 deficiency judgment. Nothing in the agreement compelled Seeburg to do any <u>more</u> for Minthorne than indemnify his $800,000 in liabilities.

3. We respectfully submit that the Court's interpretation reads paragraph 4 out of Exhibit D. This paragraph deals with Seeburg's right, after 90 days, to take whatever action "it shall deem to its best interests."

And under what circumstance was it given this free hand? If the parties "fail to reach a mutual agreement as to the action to be taken" during the 90 days.

The Court reads the language in paragraph 2 of Exhibit D as compulsive; Seeburg covenanted to give Minthorne "the opportunity to take over the said equipment and operate it himself." But there cannot be a covenant to reach a "mutual agreement." "Take over" and "operate" are not self enforcing. What was to

be done with the existing deficiencies? Pay, no pay, delay? What was to be done with machines lost or destroyed? What was to be the schedule of payments? Who was to advance to Redisco, and how much?

All these elements had to be the subject of a future agreement, a "mutual agreement." And an agreement to agree is no agreement at all.

> An agreement to make in the future such a contract as may be agreed upon at the later time amounts to nothing, is not binding, and cannot be made the basis of a cause of action. Where a final contract fails to express some matter as, for instance, a time of payment the law may imply the intention of the parties, but where a preliminary contract leaves certain terms to be agreed upon for the purpose of a final contract, such as approval of the final plans and specifications for the erection of a building, there can be no implication of what the parties will agree upon. 12 Cal. Jur.2d 315 (1932).

As a standard of interpretation, a contract will not be interpreted to be ineffective where this can be avoided. Restatement, Contracts § 236 (1932).

4. We concluded our main brief by assuming that, in case of reversal, the damages question would go back to the Court below, and therefore did not brief it. We assume that this is the purpose of this Court; i.e., to send back the damages question unprejudiced in all of its alternatives.

But we fear that the language of this Court may inadvertently prejudice the damages question. We assume, and will

argue below, if the motion for rehearing is not granted, that Minthorne is entitled to the fair market value of the equipment, plus any loss of profits pending its replacement, adjusted downward by the amounts owed Seeburg. See generally 2 Gilmore, Security Interests in Personal Property, § 44 (1965).

We are concerned that the Court's discussion of conditions and covenants may be construed to prejudice the damages position of Seeburg and, as we have suggested, be construed to cause a forfeiture. We do not believe that this is the intention of the opinion; we think that its purpose is to conclude only that Minthorne had a covenant which was breached by what it held to be a wrongful repossession, so that the normal principles of law applicable to damages for wrongful repossession would apply. We submit that the language of the Court suggesting that there is both a condition and a covenant will complicate the damages issue and protract litigation which is already too old; we ask for clarification in this respect.

CONCLUSION

The petition for rehearing should be granted.

Respectfully submitted,

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July, 1968

I certify that, in connection with the preparation of this petition, I have examined Rules 31, 32 and 40 of the Federal Rules of Appellate Procedure, and Rules 18, 19, 23 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing petition is in full compliance with those rules.

I further certify that in my judgment this petition is well founded and not interposed for delay.

JOHN P. FRANK

INDEX

CITATIONS

MISCELLANEOUS

STATE OF ARIZONA)
) ss.
County of Maricopa)

JOHN P. FRANK, being first duly sworn, deposes and says: That he has filed and served this petition for rehearing on this 19th day of July, 1968, by causing twenty-five copies to be mailed to the Clerk of the United States Court of Appeals, San Francisco, California, and by mailing one copy each to Mr. Coit I. Hughes, Hughes & Hughes, 725 First National Bank Building, Phoenix, Arizona 85004, and Mr. Harry A. Stewart, Jr., Suite 8, 3440 North 16th Street, Phoenix, Arizona 85016.

JOHN P. FRANK

JOHN P. FRANK

Subscribed and sworn to before me this 19th day of July, 1968

Francis Bailey

Notary Public

My commission expires:
August 6, 1972